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CANADA, CAPITAL AND CORPORAL PUNISHMENT AND
LOTTERIES, JOINT COMMITTEE OF THE SENATE AND
THE HOUSE OF COMMONS,

SECOND SESSION—TWENTY-SECOND PARLIAMENT
1955



Joint Committee of the Senate and the House of Commons

ON

CAPITAL AND CORPORAL PUNISHMENT AND LOTTERIES

Joint Chairmen:—The Honourable Senator Salter A. Hayden

and

Mr. Don F. Brown, M.P.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 5

THURSDAY, MARCH 3, 1955

WITNESS:

Professor C. W. Topping, Sociology Department, United College,
Winnipeg, Manitoba.

Appendix A: Statistical Tables 1 to 5 re Capital Cases.

Appendix B: Prepared Statement on Abolition of Capital Punishment.

EDMOND CLOUTIER, C.M.G., O.A., D.S.P.
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A. Small,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

THURSDAY, March 3, 1955.

The Joint Committee of the Senate and the House of Commons on Capital and Corporal Punishment and Lotteries met at 11. a.m. Mr. Don. F. Brown, Joint Chairman, presided.

Present:

The Senate: The Honourable Senators Farris, Fergusson, Hodges, McDonald, Tremblay, and Veniot—(6).

The House of Commons: Miss Bennett, Messrs. Boisvert, Brown (*Brantford*), Brown (*Essex West*), Cameron (*High Park*), Fairey, Johnston (*Bow River*), Leduc (*Verdun*), Lusby, Mitchell (*London*), Montgomery, Shipley (*Mrs.*), and Winch—(13).

In attendance: Professor C. W. Topping, Sociology Department, United College, Winnipeg, Manitoba; Mr. D. G. Blair, Counsel to the Committee.

On motion of the Honourable Senator McDonald, seconded by the Honourable Senator Hodges, the Honourable Senator Veniot was elected to act for the day on behalf of the Joint Chairman representing the Senate due to his unavoidable absence.

On behalf of the Committee, the presiding chairman welcomed the Honourable Senator Tremblay to the Committee's membership.

Professor Topping was called and was introduced by Counsel to the Committee. He presented and commented on his brief dealing with abolition of capital punishment (copies of which were distributed in advance and which appear at Appendix B).

During the course of the questioning period, it was agreed that the following five tables from the November 1952 issue of *The ANNALS* of The American Academy of Political and Social Science (pp. 149-152), referred to by the witness, be printed as Appendix A to this day's proceedings:—

Table 1—Murder Charges and Sentences, 1880-1949, by Ten-year Totals;

Table 2—Executions of Capital Offenders, 1880-1849, by Ten-year Totals;

Table 3—Capital Offenders Detained for Lunacy, 1880-1949, by Ten-year Totals;

Table 4—Persons Sentenced to Life Imprisonment, 1880-1949, by Ten-year Totals;

Table 5—Commutations of Death Sentences for Murder, 1880-1949, by Ten-year Totals.

The Committee agreed that the written representations of the witness dealing with corporal punishment and lotteries be taken as read for inclusion in the evidence.

The presiding chairman expressed the Committee's appreciation to the witness for his presentations.

The witness retired.

At 1.35 p.m., the Committee adjourned to meet again as scheduled.

A. Small,
Clerk of the Committee.

EVIDENCE

THURSDAY, March 3, 1955.
11 a.m.

The PRESIDING CHAIRMAN (Mr. Brown, Essex West): The committee will come to order. A motion will be in order to appoint a chairman representing the Senate for the day.

Hon. Mr. McDONALD: I have the pleasure of suggesting that the Hon. Mr. Veniot be the co-chairman today.

The PRESIDING CHAIRMAN: Carried.

We are highly honoured this morning in that we have had an addition from the Senate to this committee of that very genial Senator Leonard Tremblay. We are very happy to welcome him as one of our members and we assure him we shall be very pleased to have his comments from time to time, and I am sure that when we come to write our report his assistance will be most valuable.

I call upon Mr. Blair to introduce the witness today.

Mr. BLAIR: Mr. Chairman, members of the committee, our witness this morning is Professor C. W. Topping who is presently the Professor of Sociology at United College, Winnipeg. Professor Topping comes from the Ottawa valley, is a graduate of Queen's University, and, after serving in World I, he served for two years as governor of the Frontenac county jail. Thereafter he did post-graduate work at Columbia and, after teaching in some American universities, he became the first Professor of Sociology at the University of British Columbia where he lectured from 1929 to 1954. During his time at the University of British Columbia he was the first director of the courses in social work and he founded the university's department of criminology. Professor Topping is the author of perhaps the only academic work on Canadian prisons, published in 1929 under the title "Canadian Penal Institutions".

He served as a member of three departmental committees of the government of British Columbia investigating British Columbia prisons and the British Columbia Boys' Industrial School. In addition he has been a visiting lecturer on criminology at various American universities including Minnesota, California and Boston. It gives me pleasure to introduce Professor Topping to the committee.

Professor C. W. Topping, Professor of Sociology, United College, Winnipeg, Manitoba, Called:

The PRESIDING CHAIRMAN: The witness may remain seated.

The WITNESS: Mr. Chairman and members of the committee I think I shall stand for the present though I may sit later. College professors are accustomed to talk standing and I may be embarrassed if I sit down. When I see people from British Columbia present here I almost feel this is a "home from home". But I do not feel too much at home. I am reminded of a time a good many years ago when I sat in a room at Columbia University, when not quite so many distinguished people were present it is true, and I was told to relax and then I was given the works. But I did get a Ph.D. out of it so it was not so bad.

The experience put me in mind of Socrates, who at one time, I believe, drank hemlock or something like that, and I was wondering whether, if Socrates had had the privilege of sitting in on this committee and learning how to ask questions, he might have avoided drinking the hemlock.

I do not know whether it was Mr. Mackenzie King or whether it was Solomon who said "May my enemy write a book." I did not write a book but I wrote an article in this field, and I presume that is why I am here. In that article I dealt with the treatment of murder in Canada. The statistics will probably come up by and by. I started with the proposition made by one of the French scholars who was over in Europe. They asked him if Canada was a law-abiding country, and he said: "We know how to hang in Canada." That was the proposition I dealt with in my article, and I came to the conclusion that we did not. I have the latest statistics here, and Canada has a splendid record in securing convictions for most crimes. Much better than some other countries, particularly countries where abuses center around the prosecutor's office. In the most recent year shown here, Canadian prosecutors gave a *nolle prosequi* in only 55 cases. We had 32,000 people charged with indictable offences and the persons acquitted were around 4,000; which means that the chances of being convicted in a Canadian court were eight out of ten. But if you take the crime of murder, the chance of being convicted is only two out of ten. So the conclusion may be reached that we do not know how to hang in Canada.

These figures I use now are not so damaging to that procedure as those I used in my article because there the chances of being convicted were about nine out of ten.

I do not know exactly how to handle this memorandum. I do not want to read it *in toto* now. (See Appendix B for text of brief on Corporal Punishment). On the other hand there are sections which are probably better phrased than anything I can do here. May I therefore summarize sections of it, and go through the document, in a different order from the one presented. Members of the committee will notice that the first contact I ever had with murderers was when I was in charge of Kingston jail and we expected to hang two of them. We had a man and a woman, but in the end we did not hang either of them, but I never saw a man as nervous as the sheriff was when he feared he would have to preside at a hanging. With regard to the man, who was acquitted, people from his home town were prepared to pay \$50 in order to have the privilege of hanging him if he were found guilty. As for the woman, my matron fainted when she was sentenced to death.

THE PRESIDING CHAIRMAN: The matron was sentenced?

THE WITNESS: No, the woman. In the press report they said her mother fainted, but that was not true, it was my matron who fainted. But so far as I was concerned, I felt the matron had been guilty of a dereliction of duty and I would not have had the slightest hesitation about presiding at the hanging if this had been necessary. At that time I had come back from the wars and I had no sentiment about it.

Fortunately or unfortunately in 1952 the editorial committee of the *Annals of the American Academy of Political and Social Science* requested me to do some work in this field. If I may read that paragraph on page two:

I began my 1952 study with an open mind and, frankly, was not convinced by the evidence I unearthed—that murder is the safest crime to commit in Canada and that convicted murderers, by and in the large, are first offenders—that capital punishment should be abolished in Canada. But the additional study which the preparation of this memorandum entailed has taken me off the fence. I have become convinced that few sound arguments in support of the retention of capital punishment in the Criminal Code of Canada have

been presented to your committee. Worse than that, I, myself, have been unable to locate and assemble arguments for the retention of capital punishment in the Code.

May we start, now, with Schedule A to my brief and cover the arguments for the retention of capital punishment for murder.

Mr. BLAIR: Pardon me Professor Topping but what document are you referring to?

The WITNESS: Schedule A, of my brief. On page 14 members will find the document on the basis of which I made up my own mind on the subject, and in which I have tried to assemble all the arguments I could. These are the arguments on capital punishment considered in the preparation of this memorandum. I shall begin with the arguments supporting it.

1. It is a permanent cure for murder so far as the killer who is hanged is concerned.

Notice I use the word "killings" rather than "culpable homicide" because I am interested in killings, as a sociologist, rather than in the legal aspect. This argument which I have quoted appears to be sound and unanswerable. Obviously a man so dealt with will never commit murder again, at least not in this world.

2. Capital punishment deters other potential killers.

The evidence all seems to point the other way. Murder is the least risky of Canadian crimes. Of two comparable states, it is impossible to pick, on the basis of killings, the state with capital punishment and the state without capital punishment.

The third argument used is this:

3. The killer given life imprisonment for murder is likely to cost the state a minimum of \$25,000.

This is a sound argument but it is an argument of expediency, not an argument of principle. If prisons are reorganized so that the inmates work, the killer could, then, earn his keep and this argument would lose its force.

In connection with that of course the committee will note that it is necessary to convict a man before hanging him, and this in itself is quite a costly procedure. I understand from a friend who served on a jury trying a case at Vancouver that the jurors were put up at the Vancouver Hotel. The jury would have to be kept and fed during the period of the trial, sometimes a lengthy period, so it is plain that it costs money to convict.

4. The murder is a particularly brutal type of person.

Cases cited in the court battle support this proposition but cases cited in psychiatrists' reports do not. Imprisoned killers are reported to be "good convicts who do well on parole and seldom get into trouble again.

I have been reading lately some material on sexual offenders. The magazines like to report sex. One American magazine printed an article recently by the famous J. Edgar Hoover of the F.B.I. When we get a psychiatrist's report, for example, on sex offenders, we find that as a matter of fact they are a class of offender about which something can be done if proper treatment is given. Yet the whole Hoover representation of this type of man is that he is a monster. However, the psychiatrist's report says something quite different. A massacre which I read of in one of the psychiatric reports also indicates a monster. But the man who committed the massacre according to the psychiatrist's report was a much abused person who went beserk and chased his mother-in-law (whom he held responsible for his troubles) four miles before he killed her. Several other people were done to death, as well, and it looked horrible on the face of it, but, in fact, he just went beserk, focussed on one objective, and forgot about years of conventional living.

The PRESIDING CHAIRMAN: You mean he was insane?

The WITNESS: No, the psychiatrist did not consider him him insane.

Mr. FAIREY: Would it not be temporary insanity?

The WITNESS: I would not go so far as that. The worst man I ever had to deal with I called "The wild man from Borneo" in the paper I wrote on him, but the psychiatrist said he was not insane. They called him a defective delinquent, but the reports of the psychiatrists which I read are usually much more sympathetic towards offenders than the viewpoint commonly taken.

In addition, on this point, when I knew I was to be asked to come before your committee I discussed this point with practically everyone I met who had intimate knowledge of imprisoned murderers. I discussed it naturally, with a group of officials at Calderwood, which is the school for penitentiary officers at Kingston, that is their staff college, and they said that the prisoners they had of this type were among their "good convicts". With regard to parole murderers I have read documents on this, and I can find only one case of a man who was a repetitive killer.

Mr. WINCH: In Canada?

The WITNESS: No. That was in the United States.

As I said, imprisoned killers are reported to be "good" convicts. I was sorry to find this out. I would much prefer to have found out that these people were as horrible as they were reported to be, but to my surprise, according to all the reports and documentation I could get, they were not the kind of people we were led to believe they were.

5. Gangsters will invade Canada if the fear of being hanged when they kill is removed.

From any documentation which I can find, United States gangsters are not hanged. Several years ago I lived next door to one of the income tax officials who was instrumental in getting Al Capone sent to Alcatraz. In the United States they "get" gangsters apparently for income tax evasion. They do not "get" them for killing. The gangster employs "finger men" to carry out his killings. They are sometimes called "goons", but if you want to kill, you call a "finger man" in. The "goon" is a big hairy ape, and his role is usually to terrify. Normally two of them are sent along. I was only under pressure by "goons" once in my life, and I was more scared then than I am today. The "finger men" may be hanged, but that is not common either. In addition they are present in the largest numbers in the cities which have capital punishment as a control, though I do not think that argument is quite fair. Nevertheless the fact is that the United States gangsters are more common in states with capital punishment.

Hon. Mr. VENIOT: You said the people in that group are seldom hanged?

The WITNESS: I would think not. The gangster is too far away from the actual killing. He does not go in for that type of thing. There was a time when these top gangsters were "goons" and acted with brutality, but the gangster today is a very smooth person, *sauve* and well dressed.

6. More small-time thieves and robbers will arm themselves if the fear of capital punishment is removed.

Studies indicate that Canadian small-time thieves are not armed as commonly as are United States small-time thieves. This result, in my opinion, is achieved by an automatic punishment for "armed" robbery. This punishment is easy to enforce and it is effective. It is certainly of punishment rather than the severity of punishment that stops criminal acts, according to top authorities.

I have told my classes in Canada that it is perfectly safe for a Canadian to walk down his front stairs while there is a housebreaker in his home if there is a light on, but that it would not be safe to do so in the United States. A person would be liable to be shot there. I would increase the penalty for

carrying arms. My finding in my *Annals* article that the first reason for killing was that the killer has got a revolver—the negro carries a razor—and many consequences flow from that. If you make “carrying a concealed weapon” a capital offence, that, in my opinion, is very dangerous because there is no witness so silent as a dead witness. You want to make the punishment sufficiently severe to stop a man carrying a weapon, but not so severe as to lead him to kill a witness.

The law in Canada is excellent in my opinion. It is easy to enforce, and I find that it is effective.

7. More police officers will be shot if the fear of capital punishment is removed.

If I were a superintendent of police, I would certainly press this argument for all it was worth. It would be the least I could do for the officers who, on occasion, must, in the kind of world we live in, face the guns of the enemy: the criminals. But has the argument great weight? Criminals who live by their wits do not go about armed—the professional thieves; some bank bandits make a practice of not carrying guns. But some bank bandits carry a whole arsenal of guns; silly youngsters also carry them and they can get trigger happy and, even, shoot at cops. The Chicago police department report of 1953 reports three officers shot in the line of duty. In each case a criminal was shot in the same exchange; in the third case two criminals were shot. In Canada, statistics indicate that the most risky killing which a criminal can undertake is the killing of a police officer. This is the surest way to get hanged in Canada. My conclusion would be that only desperate men and fools shoot policemen. Such persons are not likely to even think of a penalty; much less be deterred in their action by a penalty.

According to sociologists, focus of vision takes place until by and by it is so narrow that everything else is driven out, and that is why a man kills. Everything else is forgotten. The only way you can explain it, in terms of motivation, is that the focus of attention becomes so narrow that all culture and civilization becomes forced out, and the consequences of an action are not considered in the least.

8. Hanging should be retained as a threat even if it is permissive and not mandatory.

The threat of strike and the threat of war are excellent bargaining devices. Does the threat of capital punishment prove equally effective when used? This is the deterrence argument in another form. If murderers killed in a bargaining mood the argument would be a most potent one; but murderers kill when intoxicated, when highly inflamed with passion, when greatly disturbed emotionally. Someone has written that hell hath no fury like a woman scorned. The murderer is not likely to listen to reason either.

To the best of my knowledge the only state in the United States that has the Canadian system of capital punishment is Vermont. In all the others it is permissive, not mandatory.

An Hon. MEMBER: Personally, do you agree with that?

The WITNESS: My brief is against capital punishment altogether.

Hon. Mrs. FERGUSSON: You would not even have it as permissive?

The WITNESS: I would not. We could discuss that during the question period.

The PRESIDING CHAIRMAN: I want first of all to apologize to the committee for transgressing the rules in that I asked a question myself when I should not have, and several others have been permitted questions. Probably we could now let the professor make his presentation and reserve our questions until a little later. If that is agreeable we will proceed.

The WITNESS: Thank you Mr. Chairman. Well, those were the best arguments I could assemble in favour of retaining capital punishment, and I put in number nine just in case anybody could think up some better ones.

Might I then go on to say that I did check the arguments on both sides, but unfortunately I started out as a debater rather than as a scientist. Most of you are familiar with commission reports. Mayor Charlotte Whitton, who has been a friend of mine almost from childhood, has said that Ottawa is the graveyard of commission reports, but I have had a rather fortunate experience. I have served on two commissions in British Columbia the recommendations of which have all been carried out.

Hon. Mrs. HODGES: What is that again, please?

The WITNESS: I said that 100% of the recommendations have either been carried out or are in the process of being carried out. Therefore, I am accustomed to presenting positive and constructive arguments in the hope that they won't just fly off into the air.

In my presentation I chose what I considered to be the least controversial of the three issues which are before you. I put in but one sentence in the brief on lotteries, and I would prefer not to discuss it, because I think there would be a great deal of disagreement on this issue. The question of gambling is a highly controversial one among reasonable people. Or, if we took up the issue of corporal punishment there might be disagreement in the committee as well.

My position on corporal punishment is, as you will see when you read my brief, that I recommend its retention within the institutions as a discipline measure, but I argue against its retention in court by justices or magistrates, as a deterrent.

But so far as capital punishment is concerned and murder, I think we are all in agreement. We are all against murder. I am against it and you are against it. So the only issue at stake is: How can we stop it?

I wrote an article arguing that we are not stopping it very effectively in Canada. The chances are eight to ten of an ordinary indictable offense leading to a conviction; whereas in murder, the chances of the man hanging are about two to ten, that is, the chances of the penalty being carried out, and for that reason I have presented this argument.

I present three arguments only, and it is interesting to observe that when Senator Farris presents a case, he hangs it on one or two sound arguments, and if he wins those arguments, then he wins his case. So you may thank Senator Farris for this form of presentation.

I would like to read next a summary of the arguments on page 10. It is easy to read words, but I have got to prove them, so in the rest of the document I try to prove these brave words. May I read from the brief?

"A review of the evidence on hanging as a control for culpable homicide has convinced me that the arguments for its retention are unworthy of presentation before this joint committee of both Houses of parliament."

I withdraw that now. I have presented this side to you already. May I, now, present the case for the abolition of capital punishment as a control for murder.

1. Capital punishment is out of harmony with the deeper social movements of the twentieth century.

Christianity is against it. Canon law found no place for it and the teachings of Jesus, which in the twentieth century are being taken more and more seriously, are opposed to it. It has commonly been repudiated by the noble and the good. It cannot be reconciled with twentieth century humanitarian movements and it cannot be fitted into the new penology.

2. Capital punishment is ineffective in controlling culpable homicide.

Statistical evidence indicates that capital punishment does not deter murderers and that, so far as Canada is concerned, murder is the least risky of all crimes. In addition, one punishment for that whole battery of crimes which is murder is considered iniquitous and simply does not get carried out.

Worst of all, the killer who is charged with murder and acquitted gets off scot free.

I do not think that a man should be allowed to kill with impunity.

Culpable homicide, thus, invites great fuss and fury but no effective action. Such a situation is not in the public interest.

3. Capital punishment is discriminatory.

In view of the severity of the penalty the strong exert their full force to avoid it.

I have put a lot of thought on that, and I think that is the most effective way to present that argument. The strong exert their full force to avoid it. None of us want to die. Therefore, we will make a fight.

The weak, thus, suffer the penalty in a case of culpable homicide and the strong escape it. Warden Lewis E. Lawes has testified that this was the situation at Sing Sing and Canadian testimony has indicated that this is the situation in Canada today. Yet, on the other hand, a despicable weak character, can, by an atrocious murder, become notorious overnight and force his name onto the front page of our most reputable newspapers.

Criminologists are not interested in one killing. As scientists they cannot generalize on one example. We are interested in a group of killings. Fifty per cent of persons hanged are first offenders.

The PRESIDING CHAIRMAN: When you say "First offenders", do you mean of any crime?

The WITNESS: It is the first record we have of them, yes.

In addition the insane, potential repetitive killer can escape the gallows and receive a second chance while his first offender companion in crime is hanged. Hanging is, also, definitely discriminatory as to victim, age, and sex.

I am now turning to page 2.

I. Capital punishment is out of harmony with the deeper movements—the social trends—of the twentieth century.

1. Christianity.

The medieval Christian church was opposed to capital punishment. Canon law found no place for such a penalty.

The first of the three major arguments is that capital punishment is out of harmony. You will remember that the famous Joan of Arc, Sainte Joan, was burned by the civil power, not by the religious power because canon law found no place for such a penalty. Anybody who was anybody became a clerk in the middle ages, anybody who could read and write, so he would be tried under canon law, which was probably the best law of the middle ages, and had no capital punishment.

Your joint committee received a submission from the Canadian Friends' Service Committee (Quakers) expressing the same point of view. Redzinowicz found 17 capital crimes in England in the early part of the fifteenth century; by 1780 there were 350.

What bothers one is this: we like to have Englishmen come out here to Canada, but when we think of all the people they hanged in those days in England, and think of what their descendants would amount to day! This gives us pause. And in addition, when we consider what happened in Australia where it is dangerous to ask people about their ancestors because

so many of their ancestors came over in the transport ships in the early days. We think again, because of the success of the descendents of the Englishmen of the transport ships.

The new offences added after 1500 were chiefly offences against property, most of them trivial. The English revolt against capital punishment began around 1825, when there were still 220 capital offences; by 1861 these had been reduced to 4. Murder is the one crime in England today for which, in practice, capital punishment is put into operation. (*Annals*, November, 1952, p. 11.)

If one might comment briefly: In the field of psychology, it is argued that the chief virtue of a punishment should be that it is logical, and that it should seem reasonable to the person who gets it. Thinking this over, it seems to me that that is the reason why murder has been retained as a capital offence. It seems quite logical. Here is a man who has killed, therefore, he should be killed himself.

The trend in England is cited as representative of movements in Christian civilizations. Juries, in England, refused to convict persons who "were proved to have stolen" 40 shillings if conviction meant that such persons would be hanged. (*Loc. cit.*).

The fact that the founder of christianity suffered a capital penalty for heresy and for treason, has made christians hesitant to press these charges. Heresy is no longer a capital offence in christian countries. Concerning treason, of the 99 persons sentenced to death as a result of the Canadian Rebellion of 1837-1838, only 12 were hanged. (*Op. cit.*, 149.)

The teaching of christianity concerning the infinite value of the human person has been used as an argument for the retention of the death penalty by focussing attention on the victim of an assault. But two wrongs have seldom made one right. Either human life has infinite worth, as christianity teaches, or it hasn't.

At one time persons who had stolen something to the value of 40 shillings, if convicted, would be hanged. That is highly controversial, but I am convinced that if your penalty is too severe, juries will not convict and prosecutors will not prosecute. I cannot prove it, however, but there is this evidence which I present. Historically where they proved that culprits had stolen 40 shillings, juries did not convict.

I do not think we need to bother with the next sentence, except to say that we do not have capital punishment for heresy any more or treason. And going back to the 1837-1838 rebellion, of 99 persons who were sentenced to death, only 12 were hanged. So your chances were even more remote then than they are now in the modern murder case.

On the basis of christian teachings the deliberate taking of human life by a citizen or by the state, cannot be condoned.

2. The Great and the Good.

This has been consistently the position of the great and the good. Dr. Samuel Johnson was convinced that spectators were being cheated when they were not permitted to view hangings and this position was held by the persons who constructed Kingston jail—with its great door to drop when the gallows were sprung. But a hanging at Kingston jail today would see the great door fastened firmly in place. Hangings are regarded with horror by a majority of the citizens.

Those who gloat over the details as reported in the press are regarded as sadists by most of us. The cross which to the Roman was a symbol of capital punishment has become the symbol of christianity; the open gallows,

which was once the symbol of justice and right, has become, in our day, the symbol of the Roman circus as exemplified by the Emperor Nero.

3. The Humanitarian Movement.

We no longer hang children and we seldom hang women. Shortly, we will not hang men either, if the trend here is the same as in other humanitarian movements; for the trend in most of these movements has been to advocate more enlightened and humane behaviour, first, for young persons, next, for women, and, finally for men. The British royal commission on capital punishment, 1949-1953, were impressed with the lethal injection as a substitute for hanging; but they did not recommend it in their report. It is possible that they did not care to place the burden of carrying out the sentence of a court on members of a highly respected profession. Medicine, today, stands for the saving and the conservation of life; not for its destruction. And this trend towards the amelioration of the conditions under which living and under which dying take place is of the very essence of our time.

One does not wish to go off on a tangent into sociological theory, but a point made by Dr. Franklin H. Giddings may be in order under this heading. Giddings argued that one test of progress in any group was a transition from primary to secondary conflict as an instrument of policy; from the fist fight and the strong arm of the OGPU to a fair trial and the presentation of reasoned argument: from rule by might to rule by law. Capital punishment is an instrument of primary conflict. And the pointed question he would ask the rulers of a civilized state is, "Can gangster methods stop gangsters; either in the short run or in the long run?"

To use an illustration: in the days when Britannia ruled the waves, and during that period, you could send an English gunboat to an area where there was trouble, and the trouble would stop. Britain had prestige and that kind of thing, but now we send an army into Korea under the United Nations, and what did we have on our hands? A war. At that level we do not have the rule of law and the prestige of justice, but we have a war on our hands. That is what I am thinking of. That is why people kill or do not kill and for that same reason, I think it is the custom of the realm which produces murder.

4. The New Penology.

Capital punishment, as a control, cannot be fitted into the new penology. The old penology was a system of punishment based on an "eye for an eye and a tooth for a tooth" justice. Under it, the punishment had to fit the crime.

That is following Beccaria, and you are familiar with the Gilbert and Sullivan operetta "Let the punishment fit the crime".

The new penology, by contrast, is a system of treatment. It does not assume that all criminals are sick people but it does endorse principles which lie at the root of modern medical practice. If crime is sickness it is a complicated, fundamental, contagious, highly dangerous sickness; like leprosy rather than cancer. Treatment must, therefore, be highly skilled, sympathetic, patient, and frequently, of considerable duration. Doctors do not punish patients for ailments that do not yield readily to their best endeavours. They do not practise atrocities upon them; nor do they put them out of business, even quietly. The new penology is grounded in legal principles, in principles of right and of justice, as well as in medical principles.

Mr. Justice McRuer once wrote a very brilliant article on the California system, according to which those who are found guilty by the court are then sent to a commission which decided what to do with them. Some of us are worried about this kind of thing because we feel that the history of the law has established some fundamental rights of which we ought to take great care.

II. Capital punishment is ineffective.

I think I should read that sentence probably from this document. You have it in the record because it was quoted by the Canadian Welfare Council to you, but I think we should get it clearly before us again.

Mr. BLAIR: Would you mind identifying the volume?

The WITNESS: This is "Annals" of the American Academy of Political and Social Science for November, 1952, and it is at page 154. I do not think it is to be found on the document which you now have in front of you.

It seems clear that there is an inverse relationship between severity of punishment and certainty of punishment, and that Canadians are suffering under a delusion when they assert that they know how to hang. The net result of the administration of justice in Canada as it relates to capital offences is that murder has become the least risky of any or all the offences which a citizen might choose to commit.

I think the Canadian Welfare Council quoted that passage to you as well. And now I want to present the evidence and it is in front of you there. It shows that the chances were nine out of ten of being convicted if they were charged with an indictable offence, whereas the percentage of persons, for the lowest ten-year period over the past 70 years, who hanged was only 17% of the charges. So you can see that the figure is quite valid.

Hon. Mr. FARRIS: Does that statement take into account the reduction of sentences?

The WITNESS: No, not in Table 1, but they are considered in Table 4.

The statistics are complicated by the fact that the figures given by the Bureau of Statistics and those supplied by the Minister of Justice do not agree.

Let us take the numbers themselves. I present seventy years while the Minister's tables present the period 1930-1949.

Mr. BLAIR: Are you referring to the tables which were presented by the Minister of Justice to the committee last session.

The WITNESS: Yes, and I checked them for the period of 1930-1939. They have not listed the charges, but they have listed the sentences. In my table I give a figure of 194 sentenced in the period from 1930 to 1939; the other document gives 208 for the period 1930-1939; I give 177 while they give 199.

But let us take the mean of that—the average for the ten year period. For example, 1930-1939 works out in my table at 19.4 while in the Minister of Justice's table they work out at 20.8. So there is not so much variation.

Now, 1940-1949, I got 17.7 as the average on the ten year basis, while the minister's figure gave us 19.9. There again there is a slight variation, but it is not sufficient to vitiate the document.

Now, if we go over to table 2, the executions, my table gives 127 for the period 1930-1939, while the minister's table gives 125.

Mr. BLAIR: I beg your pardon. Perhaps I should say for the record that Professor Topping appears to be reading from tables which are not before the committee, but which are presented as part of this article written in the November 1952 issue of "Annals". I wonder whether it would be the wish of the committee to have these tables, to which Professor Topping is referring, reproduced as part of the evidence, so that the members of the committee can compare them with the material presented by the Minister of Justice which appears at page 512 in the record of last year's proceedings.

Mr. WINCH: You mean as an appendix of this day's proceedings?

The PRESIDING CHAIRMAN: Yes. Is that agreeable to the committee?

Agreed.

(See appendix A)

The WITNESS: Since it is going into the record, Mr. Chairman, may I offer a comment. I am familiar with the application of the statistical records because I have had certain experience in connection with them, but these tables are very simple tables. They are not presented for Canadians; what I was attempting to do was to present a picture to the world of what is actually happening in Canada. This document goes into the United States. It is an American document, and it goes all over the world, but I wanted to have a picture of what is happening in Canada so I have made half a dozen tables from that point of view.

The CHAIRMAN: Which tables are we going to have put into the record? Would you indicate, Mr. Blair.

The WITNESS: This is the article which I have in front of me, and it goes from page 147 on. Maybe you do not want to have the whole article?

The PRESIDING CHAIRMAN: No, just the tables.

Mr. BLAIR: Professor Topping, you are now referring to table 1 of this article which is entitled "Murder Charges and Sentences 1880-1949, by Ten-Year Totals."

Hon. Mrs. HODGES: Are these in Canada?

Mr. BLAIR: Yes. Table No. 2 "Executions of Capital Offenders, 1880-1949 by Ten-Year Totals." And that appears on page 150.

The WITNESS: There are altogether five tables, and it might be wise to put them all in your records.

The PRESIDING CHAIRMAN: Agreed.

(See Appendix A)

The WITNESS: I do not think we need to spend any more time on it, as I have demonstrated that it does not make any difference whether you use the Minister of Justice's tables or those from the Bureau of Statistics.

Hon. Mr. FARRIS: I am not clear on the statement yet, whether, when you say "executions" in contrast with "charges", if there is not a middle ground of manslaughter charges and cases in which the Minister of Justice or his department has commuted the sentences.

The WITNESS: That is what these tables are. May I read table 1. It deals with "murder charges and sentences" over a 70 year period. On the other hand table 2 deals with "executions of capital offenders" over a 70 year period; and table 3 deals with "capital offenders detained for lunacy", so far as capital offences are concerned; and table 4 deals with "persons sentenced to life imprisonment", and I presume that those persons sentenced were manslaughter cases, but I cannot prove it.

Mr. BLAIR: That is a point which has exercised me, and I think it is important enough to justify a statement on my part at this time.

What Professor Topping has presented is a set of figures which show the number of charges for murder in a given period; the number of convictions; and finally the number of executions.

But Senator Farris' point is that these figures do not indicate the middle position where the person who is charged with murder, is only convicted of manslaughter. I have searched the statistical records available on this subject and I have conferred with the Dominion Bureau of Statistics, and I find there is no way of presenting statistical information to show the number of murder charges in Canada over the years which have resulted in convictions for the lesser offence of manslaughter.

Therefore, I think that these figures which Professor Topping has presented to us, do not answer Senator Farris' question, and cannot answer it.

The WITNESS: That is quite true. You will notice that this material is not the approach which was made by Professor Sellin who appeared before you. He used homicide and made his correlations on this basis.

But I started out by trying to study killings. For example, Hoffman made studies in the south; what he did was to go around to the morgues and take note of the killings that are not a matter of record but which may be murders.

Many of the corpses one finds in the morgue, may be murders but they never appeared in the records in the south at all. I tried to start with the report of the British Columbia Police and to check the killings which were investigated by the police in British Columbia, and it was simply fantastic the number of killings which were investigated by the police and which were presumably potentially murders, when whoever committed the crimes were not even charged. I have some statistics in front of me.

Mr. BLAIR: Would you mind identifying the document?

The WITNESS: These are the 1952 statistics of criminal and other offences in Canada, issued by the Dominion Bureau of Statistics; and I am referring to page 45.

Mr. FAIREY: Is Professor Topping saying that there were killings which occurred in which nobody was brought before the courts at all?

The WITNESS: Yes.

Mr. FAIREY: Do you have reference to the killing in Vancouver on the golf course, where the murderer has not yet been apprehended?

The WITNESS: I am not thinking of that.

Mr. FAIREY: Then what do you mean?

The WITNESS: What I checked first was the killings in British Columbia which were sufficiently doubtful to be looked into by the police. That is a matter of record, you see, and a great many of these were accidental killings, probably, such as automobile killings, and no action took place at all because it was perfectly obvious that there was no intent to kill. I just checked one province. May we now check the woundings and the shootings in this document? There were 211 woundings; if these attempts had been more successful, we would have had 211 murders.

Hon. Mrs. HODGES: Were they not investigated?

The WITNESS: The deaths were investigated by the police.

Hon. Mrs. HODGES: The word "killings" was confusing to some of us, because you had assumed that they were killed.

The WITNESS: Some would be deaths which were investigated by the police as being deaths of sufficient doubt to merit being checked upon.

Hon. Mrs. HODGES: I was questioning your use of the word "killings", which gives a rather confused impression to some of us.

The WITNESS: Let us say suspicious deaths, sufficiently suspicious to be investigated by the police. But I deal here with shootings. If these people had been better shots—we had only 18 murders—but we would have had 18 murders plus 211; and then there were 69 cases unpremeditated. That is the matter Senator Farris referred to. It seems in this year there were 69 committed by men and 8 committed by women.

The second argument was the argument used by the British commission, namely that murder is many crimes instead of one, which so complicates the issue that you do not get action on it. May I quote from a review of that document in Canadian welfare:

"The commissioners discovered that murder represents not one crime, but a whole series of patterns of crime, and they present thumb nail sketches of 50 English and Scottish murderers to drive this conclusion home.

The commissioners are convinced that the present law of murder does not permit sufficient weight being given to extenuating circumstances.

They suggest that, if no satisfactory and workable method for mitigating the rigours of the law can be devised, then the issue must become 'whether capital punishment should be retained or abolished.'"

Now on that I have a question I should like to ask here. I understand from Mr. Justice Hope's presentation that at any point in a trial in Canada a judge can change the charge from one of murder to one of manslaughter. I know the jury can bring in a verdict of manslaughter, but the danger there is that they are not instructed to do so and that is the weakness in the law. Am I correct in that interpretation that at any point in the trial the plea may be changed from one of murder to one of manslaughter?

Mr. BLAIR: Mr. Chairman, I think we should put a qualification on that statement in order that members of the committee may be able to check further.

The WITNESS: I like that feature if it is a feature of the law, but that is an important issue. The committee has to decide also, if there is to be "second degree murder." If the justice in charge can change the plea.

Mr. WINCH: You mean the charge?

Hon. Mr. FARRIS: I suppose he can direct the jury that there is no evidence on the major crime.

The WITNESS: Can he stop the trial at any stage and say the charge is going to be that of manslaughter?

Hon. Mrs. FERGUSON: Would that not necessitate a completely new trial?

The WITNESS: I am going on Mr. Justice Hope's evidence.

The third argument is that it permits large numbers of persons who kill to receive neither punishment nor treatment.

The fourth argument is the most controversial of all. I do not know whether I should attempt to say anything on it, because we shall no doubt have some discussion on the subject later.

This is an argument that appears again and again in any discussion of capital punishment.

The question is whether it is a deterrent or not.

A further major argument is that capital punishment is discriminatory. There are a number of points here, and I do not think we need go into them all in detail. But the first one is, I think, quite important. That is, that when a man is battling for his life he will exert his full force and he will draw upon all his resources and the resources of his friends. Specifically this means that he will employ the best counsel possible, even at a fee of \$20,000, and that he will rally what friends he has to his assistance. This counsel and these friends will use their best skill to avoid so severe a penalty as death.

Since the evidence is likely to be circumstantial and based on the principles of logic, conviction is difficult. Murder is a low visibility crime with few eye witnesses who can be called in to testify at the trial. With powerful friends and resources the struggle will be a long one; no quarter will be asked or given. And there may be delays until the furore has died down; and appeals.

For example, one of our recent murders in Manitoba involved the killing of a priest by some boys. That was quite a while ago. The matter has been delayed, and it will be delayed probably longer. Two of the boys are juveniles, which creates further complications.

Authorities are convinced it is discriminatory in fact and in practice.

By committing a capital offence a nobody can become a somebody.

I tell my students you can come first in the examination and you will not get on the front page, very quickly. The poorest student in the class, especially if he is a good shot will quickly become notorious in this manner. I do not like this. I think the brilliant pupil should get on the front page.

The repetitive killer may escape the gallows.

The death penalty places justice beyond rectification.

That is the trouble with it. There is nothing you can do about it. I have not, to speak frankly, been able to find a case in Canada where we have had a miscarriage of justice in this respect. I was in the courts for two years in this prison position and the general conclusion I came to was that if a man was found guilty in the high court he was pretty well guilty. But that may not always work out. I have not been able to find a miscarriage of justice, but there is always the possibility and if somebody is hung there is nothing that can be done to rectify it. Then: circumstantial evidence may be discriminatory as against other kinds of evidence.

It has been argued that circumstantial evidence may be the best of all evidence since it must be both consistent and logical. But it is, at least, different. Thus the murderer is convicted on different evidence to that on which other persons are convicted. This may well prove to be discriminatory.

Another argument is that: first offenders in capital offences are discriminated against.

The first offender ordinarily receives favourable treatment from the court. He is frequently given probation and a chance to do better. This is not the case in capital offences.

And then I argue it is safer to kill some persons than others. I am not so sure of this, but on the basis of the meagre statistics which I have been able to find, I conclude that it is safer, for example, to shoot a sweetheart than a wife and that a policeman is the most risky of all to shoot. The commonest hanging is of a man who killed while committing another offence, for example an armed robbery.

Further, capital punishment is, of course, discriminatory as to age and sex. Young persons cannot be hanged in Canada, and women are seldom hanged in Canada.

May I close, Mr. Chairman, by presenting two arguments which are contained in the schedule and which do not appear in the brief.

The hanging of a murderer does not restore the life of his victim, nor does it do anything constructive in the way of atonement. That is on page 18. In a word: two wrongs never yet made a right.

And then, on page 19: the chief sufferers from a hanging are the loved ones of the man who has been hanged.

Carousel made this point dramatically. It was the daughter of the would-be killer who suffered and his wife. But the kids only called her

father "thief". It is bad enough to be the son of a thief; to be the son of a convict must be worse; to be the daughter of a man who has been hanged must be insufferable. Why should the state thrust this ignominy on any human being?

Hanging is brutal, discriminatory; out of harmony with our highest emotions and our fairest achievements. In addition, it is ineffective. This is the weight of the argument for the abolition of capital punishment as the control for murder in Canada.

The PRESIDING CHAIRMAN: Now the balance of our period will consist of questions put to the witness and his replies to them, and I think we should start with our counsel Mr. Blair if that is your pleasure.

By Mr. Blair:

Q. First of all, I should like to identify some of the documents which Professor Topping has read. The statistics to which you referred, from time to time, having to do with offences other than murder came I take it from the publication of the Bureau of Statistics entitled *Statistics of Criminal and other Offences, 1952*.—A. Correct.

Q. And the other document from which you read extensively, is now identified as your article, appearing in the *Annals of the American Academy of Political and Social Science* of November, 1952?—A. Yes, sir.

Q. Professor Topping, I wish to ask you some questions about your statistical tables and particularly about your assertion that only two out of 10 people who commit murders in Canada are hanged for the offence.—A. I think my statement was "who are charged with". At least that is what it should have been.

Q. Right. First of all I would like to clarify what is included in your statistical tables as to sentences received by people charged with murder. Do these tables include sentences for the lesser offence of manslaughter?—A. No they do not. These are only people charged with murder.

Q. But the tables do not deal in any way with people who are charged with murder and are only convicted of manslaughter?—A. No. I do not know where to find that information. The numbers are rather small. You have ten a year, let us say; something like that.

Q. Have you any way of indicating to the committee what proportion of the murder charges result in convictions for manslaughter?—A. I do not know. My table checked that (in table 4). Those are people given life sentences; and I was surprised to find, Mr. Blair—I think you are correct—but I did assume that anybody charged with murder, when the plea was changed to manslaughter, would be given a sentence of life imprisonment. In table 4 that apparently is not the case.

Q. That is not the straight manslaughter charge. I am not dealing with that.—A. I do not see, Mr. Blair, how there can be so many. We have got our total charges. We have got our sentenced, we have got our life imprisonment group and our commuted group. They balance in the statistics presented last year by the minister when you include the "otherwise" in table "A" presented by the minister (p.512).

Q. I think you agreed that the Minister of Justice at no time gave any breakdown of prisoners convicted of murder as opposed to those convicted of manslaughter, and his statistics started for persons actually convicted of murder.—A. But in this there are sentences executed, commuted, and otherwise, and I totalled these up. Ninety-five executed, for example, in the first ten-year period and 104 got other terms. I added this up to see if that totalled, and they worked out. If you deduct those hanged from all others, they total the right amount.

Q. I am not interested, Professor Topping, in reconciling the statistical data presented by yourself and by the Minister of Justice because I think they are capable of reconciliation, and that the reasons for any difference are entirely technical in character. I am addressing my questions only to this point of whether your tables include the sentences of persons who were convicted of manslaughter although originally charged with murder.—A. My own comment on that is table 4, and the totals there represent persons convicted of manslaughter who get life imprisonment. That may not be correct. If you take the hon. minister's tables, presented last year, in Appendix A, you have this: in 1930 there were only five cases commuted, but I think we could work out the manslaughter cases from that table.

Q. It is essential to get the statistics clear if we can. It has to be borne in mind that the hon. minister's statistics presented at the last session only dealt with cases of people who had been convicted of murder. Those are the only cases of which the Department of Justice had knowledge and the minister's statistical tables simply dealt with the number of convictions for murder. Professor Topping's tables start with people charged with murder, and the point in my questions is to show that there is a gap in Professor Topping's tables between persons charged with murder and those convicted because no figures are provided for those convicted of the lesser offence of manslaughter.

Mr. CAMERON (*High Park*): I have nothing to say, Mr. Chairman, except that I should like to mention now that I understand why Professor Topping was so successful in his debates with the late Mr. Justice Hope. To my mind the brief covers the different points very clearly. Professor Topping has drawn certain conclusions, and if I have certain conclusions of my own, to express them now would be entering into a debate, and I am not anxious to have a debate with the Professor at this stage. I think it best, therefore, to study the brief.

Hon. Mr. TREMBLAY: I will sit and listen for a while.

Hon. Mr. McDONALD: I would like to say, Mr. Chairman, that I have a strong impression from all I have heard and read, though I may be wrong, that our present law has a healthy respect shown toward it by the people. For instance, I know of a man who became very angry with another man for attempting to break up his home, and I am sure he would have killed that other man if it had not been, as he said, for the respect he had for our law on capital punishment. Therefore it seems to me that our present law is a deterrent to crime.

The PRESIDING CHAIRMAN: What is the question?

Hon. Mr. McDONALD: Does that have any weight with a man of Doctor Topping's education and experience?

The WITNESS: Well, the hon. Minister of Justice presented that argument much more strongly than you have just presented it. He made the point that it was impossible to tell how many potential murderers were deterred. That is asking an impossible job for a statistician. I know the committee may be a bit suspicious of statistics. I do not blame them one bit. If I were in parliament I would be very suspicious of statistics myself. However, if you take the field of labour for example, there was a time when if you sat on a labour commission the workers would present one kind of statistics and the employers would present another and they were miles apart. At the bottom of the depression, for instance, there was a disparity of three million in the United States as to how many unemployed there were. Unemployment is a very difficult

field in which to get accurate figures. But all that kind of thing has pretty well gone out now with the development of reputable statistics. Ordinarily the statisticians on both sides will be able to get together and reach some kind of agreement.

The PRESIDING CHAIRMAN: Referring to Senator McDonald's question, I think we are all pleased that the husband did not shoot the suitor. Does that summarize it?

The WITNESS: It raises a question that the statistician cannot answer. We cannot sample all the population.

The PRESIDING CHAIRMAN: Are there any other questions?

Hon. Mr. McDONALD: I have been doing most of the talking and I apologize for taking up so much of the time.

The PRESIDING CHAIRMAN: No, no. We are all here to try to find the truth of these questions referred to us so do not feel that you are taking up too much of the time. Now, Senator Farris.

By Hon. Mr. Farris:

Q. On page 16, item No. 2, you say:

A majority of murderers are first offenders.

—A. Yes.

Q. I suppose the reason is that they do not get another chance?—A. No, that is not it. There is no previous crime against him. That is what we are talking about. There is no previous charge against them; they have never come into contact with the law before. That is the conclusion. There are first offenders and twenty-five times offenders in the statistics here.

Q. And that paragraph 2 goes on further to say:

First offenders are, commonly, treated more leniently than other offenders.

Are you suggesting an unfair discrimination and that the murderer is not given any chance?—A. No. I assume that the first offender, by and large, is treated more considerably. First offenders are commonly put on probation or are let off; but that does not happen in this case.

Q. Do you suggest it should?—A. Why I suggest it should is that I talked with administrators in the prisons and asked them what kind of prisoners these manslaughter cases which were not hanged were, and they said, "They are very good persons." And that meant a specific thing in a prison. It meant that they had not caused trouble.

The PRESIDING CHAIRMAN: Now, Mr. Lusby.

By Mr. Lusby:

Q. In regard to your first argument on page 10, you say that christianity is against it. Is it not fair to say that is a matter of opinion, and a rather debatable one?—A. No, I do not think so. The argument is that of an "eye for an eye and a tooth for a tooth" justice. This is the teaching of the Old Testament but it is not the teaching of the New Testament. If you follow the teachings in the New Testament, I do not think you will find support for it in the teachings of Jesus, who was the founder of Christianity.

Q. Is it not true that the churches, who should be considered as experts, have not taken a uniform side in favour of abolishing capital punishment?—A. That is why I cited canon law. The canon law did not have that punishment for a capital offence, when it was the great universal church, before the churches split off into Catholic and Protestant. I made a study of Pope Innocent III. He and his successors did not feel that the church should stain its hands and have capital punishment in the canon law.

Q. But some of the modern churches at least have not taken that definite stand?—A. Well, if you have ever attended a church assembly, you will have realized that the clergy are a group of orators. I wonder if you have ever tried to get a resolution through a church assembly? Believe me, that is something.

Q. With regard to the evidence that capital punishment does not deter the murderer, I take it that what you said in answer to Senator McDonald did not go so far as to imply that there would be no cases in which someone might not be deterred through fear of capital punishment?—A. No, but I did say that all we can do is to take samples. We cannot study the whole population.

Q. It is probable that the retention of capital punishment might preserve a few lives which would otherwise fall victim to a murderer?—A. Yes. I am interested in the elimination of murder. But the device we use is very, very clumsy. It is not as effective as the device we use in other cases. Here we only get a fifty-fifty result or chance, whereas in the other kind of trials in Canada, the chances of getting off are less.

Q. Do you think that efficiency would be greater if you abolished capital punishment?—A. I do. I think you would get a higher rate of conviction, but I cannot prove it. I referred to the 40-shilling theft for which apparently the juries in Britain did not convict, where the man was to be hanged. I did not use an extreme case such as this: that in the olden days they used to hang people for picking pockets. Yet more pockets were picked at hangings than at any other place. But I would not use that argument because it is an unsound argument. The best place to pick pockets is in a crowd, and there were great crowds at the public hangings.

Q. I have one more question. You say also in paragraph 2:

Worst of all, the killer who is charged with murder and acquitted gets off scot free.—A. Yes. Doesn't he?

Q. That is true of every crime. If a man is acquitted he gets no punishment.—A. Yes, but this is the worst of crimes.

Q. Then why do you favour that for murder and for no other crimes?—A. Because this is the ultimate penalty. If a man should steal fifty cents and get off, who cares? But if a man commits a murder and gets off, it is a bad business. What bothers the inmate is this: You will find if you go to a prison—they have prison lawyers in prison, and these prison lawyers will say: "Here is judge so and so. He gave me twenty years for this." And another inmate will say: "I did something worse, yet I got only five years." That is not good from the point of view of reformation. We want the man to look at himself, just as the prodigal son did, and to take steps to reform himself. We do not want him to feel that he is merely unlucky.

THE PRESIDING CHAIRMAN: Now, Mr. Winch.

MR. WINCH: I find myself somewhat overwhelmed, Mr. Chairman, by the brief which Professor Topping has presented, and by his extemporaneous remarks. I am very grateful, sir, that he has presented both sides of the picture to us, and that he has reached certain conclusions. But because I think his presentation has been so voluminous and of such importance, with both sides of the picture having been presented, and with his having reached certain conclusions, that I would like to have more time to study the transcript. Therefore, I have no questions at this time, but I hope that we may consider at a later time calling Professor Topping back again.

THE PRESIDING CHAIRMAN: Now, Mrs. Hodges.

HON. MRS. HODGES: I have no questions.

THE PRESIDING CHAIRMAN: Mr. Johnston?

Mr. JOHNSTON (*Bow River*): No questions.

The PRESIDING CHAIRMAN: Mr. Fairey?

Mr. FAIREY: No questions.

The PRESIDING CHAIRMAN: Miss Bennett?

By Miss Bennett:

Q. How are you going to measure the deterrence that capital punishment has? It seems to me it all goes back to that.

A. That is an argument that we find everywhere in my field. It is what we call frozen in literature. The argument was that all punishment deterred. I could use the same argument for whipping, you see. Today we argue that originally the idea of punishment was deterrence. Men were very brutal and they had to salve their conscience in some way and they said: "Let us do this thing which will deter."

But a witness argued and said: "If you want hanging to deter, you ought to make it public, then hang them in chains, just as Cromwell was hanged in chains in the public square in England; and you ought to hang them as they did in the middle ages, when people who were hanged were left to rot in public."

If you are going to make it a deterrent, why make it so secret? Why don't you make it public.

A British Columbia departmental commission on the boy's industrial school found that the whippings there were given publicly in front of the boys at the lunch hour. The commissioners recommended that that be stopped at once. We found that it only made the boys angry and that they were ready to riot at seeing the way a boy was abused in front of them.

There may have been a time when brutality deterred; but today with hanging, particularly if you pull a man's head off, the public will resent it, just as they did in Hitler's Germany. So I think it causes resentment in people rather than deterrence.

And then there was the case of a young negro boy who was going out to be hanged when a friend shouted down to him from an upper tier of cells: "I will soon be joining you." That has a definite psychological effect. I am little worried about it, although we cannot prove except by making sample tests because we cannot check everybody.

Q. That is all.

The PRESIDING CHAIRMAN: Now, Mr. Leduc.

By Mr. Leduc (Verdun):

Q. On page 10 you say this:

Statistical evidence indicates that capital punishment does not deter murderers...

Is that evidence obtained from murderers only or from the public?—

A. This was obtained from statistics, from this document here before us; and the conclusion is, as we said, that in other cases, we get a conviction in nine out of ten cases, whereas in cases of murder we get a conviction in only two out of ten cases.

By Mr. Fairey:

Q. As to that two out of ten cases, are they only convictions for murder or convictions for murder plus some lesser crime?—A. No, that 20 per cent is based on charges of murder, and the fact is that they have hanged only two out of ten.

Q. The accused had not been convicted of something other than that for which he is being hanged?—A. No. That was the point raised by your counsel. But these figures are rather small because we have no way of knowing what happened in other cases.

Q. You mean that he was given the benefit of the doubt.

By Mr. Leduc (Verdun):

Q. My last question is this: If the murderer is convicted as such by a jury, are you of the opinion that the judge presiding at the trial—each case being a special case—should have the alternative to condemn the accused to death or to imprisonment for life, with a recommendation for treatment according to the new penology?—A. That was the point I made, whether it be mandatory or permissive. Mr. Justice Hope was quite opposed to it, but it is the custom in some other countries that the judge has authority, or the jury has authority. But I think the judge could be counted on always to tell the jury that they had that right and could exercise it in cases in which they were instructed. If not so instructed, I think that the defence counsel would appeal, but there were cases where the accused had no defence counsel.

Q. You do not think that the judge is the best man to decide?—A. Mr. Justice Hope did not like it, but, certainly if a change were to be made, and if the committee were to recommend the striking out of capital punishment, or to reduce it for something like infanticide to a five-year penalty—we have never hanged anybody for rape—

Q. I mean about murder. You would be of the opinion that you have expressed already?—A. There are three things you can do; no, there are four things. The first is to leave it as it is; the second is to make it permissive rather than mandatory; the third is to recommend that it be struck out of the statute permanently, and the fourth that it be struck out for a trial period of, say, five years. I think these are the only options so far as the committee is concerned.

Q. Thank you.

The PRESIDING CHAIRMAN: Now, Mrs. Shipley.

By Mrs. Shipley:

Q. You used the term many times that murder is the safest crime in Canada.—A. That is right.

Q. I was impressed with your fairness, but I feel that your statement gives a very definite impression that our system of justice permits unfairness for various groups, whereas what you actually mean is that murder is the safest crime in Canada for which you may suffer the maximum penalty.—A. No. We just do not have it in cases of murder except in two cases out of ten.

Q. I mean hanging only.—A. Oh, yes. We may declare them insane or give them life imprisonment.

Q. Does that not prove that our system of justice takes into consideration all the mitigating circumstances of which you are so strongly in favour? I mean you are proving another point entirely are you not, sir, when you say that only two out of ten are hanged?—A. I could do it from the angle of the bootlegger. When I was in charge of the Kingston jail the first year, bootleggers got six months or \$600 plus costs. But the second year they got greatly reduced penalties. In some jurisdictions in the United States no bootlegger was ever convicted.

Certain kinds of crime are enforced while certain kinds of crime are not. My argument is that even with our wonderful system of justice which I concede, as represented in the figures, we just cannot convict these murderers.

Q. It seems to me that you use the term "conviction" as applying only to hanging. I do not think that the Canadian system of justice means that every person who commits murder must hang. You are disregarding all the other sentences that people who commit murder may receive. That is my point, and I think that when you say that murder is the safest crime to commit in Canada, it is a very sensational statement.—A. That is true.

Q. And I think it would be looked upon by the general public as meaning that we do not administer justice in this country in murder cases the way we do it in the case of other crimes.—A. It might backfire. You are making a very good point.

The PRESIDING CHAIRMAN: Are you through Mrs. Shipley?

Mrs. SHIPLEY: Yes, thank you.

By Mr. Winch:

Q. I would like to ask Professor Topping following the line of Mrs. Shipley's question this: do you feel that one reason there is such a low number of convictions for homicide is because— —A. No, I did not cite homicide.

Q. You mean murder; and that it is because a murder charge always goes to a jury, and the jury, although they may think, or be inclined to think that the accused is guilty, yet because they know the law says that if they find him guilty, it is mandatory that the death penalty be invoked, and therefore they err on the other side and find him not guilty?—A. No, I would not go that far. What I did was to take it all along the line. For example, one particular matter cited in this document was the investigations made by the R.C.M.P. I checked with their investigations in that area and I checked their murder investigations.

Now, of the murder investigations of which there were twenty-eight, only one person came to trial for murder; yet in nine out of ten cases in other investigations they got convictions.

I have before me "The Annals" for November, 1952, and I turn to page 154. My argument is that the prosecutor will not prosecute in cases of what we call the low-visibility crimes.

The Royal Canadian Mounted Police reported in detail the disposal of the 28 investigations of 1951 which involved murder. Eleven of the charges were reduced to manslaughter; 8 cases were awaiting trial at the end of the year; 4 had been acquitted; 3 had committed suicide; 1 had been declared mentally incompetent to stand trial; and in 1 case only was there sufficient evidence to proceed with a trial for murder. Not a single 1951 investigation had resulted in a conviction for murder, and not one person had been hanged as a result of these investigations.

The significance of this report is that a police force which out of 22,818 investigations had succeeded in obtaining 12,386 convictions, or 54.3 per cent, were unable to locate and assemble evidence to satisfy the prosecutor in cases of murder.

That was the picture.

By Mr. Blair:

Q. Perhaps I might ask one or two questions to clear the record. I think only one person was convicted?—A. No, he was up for trial.

Q. It is quite clear from what was previously read that the majority of these people referred to were either charged with some other offence or were under investigation; but I am wondering whether a misleading impression

might not be created, by suggesting that out of 28 people only one person was effectively prosecuted. I am sure you would not want to create that impression?—A. That is what the record shows, and it seems to me that the police had a pretty rough ride apparently in that area.

Mrs. SHIPLEY: They had not been proven guilty of the crime of murder. They were suspects. Isn't that true? And isn't it unfair?

The WITNESS: No. They were investigated.

The PRESIDING CHAIRMAN: What Mrs. Shipley says is that either there was an investigation or there had been a trial with a sentence imposed of hanging, of capital punishment.

The WITNESS: We have got to compare comparable ideas. We compare charges, which I have shown; we compare prosecutions, or we compare investigations. I am doing the same thing here, comparing investigations, and I do not feel that the Senator should suggest that I shift my base.

The PRESIDING CHAIRMAN: Mrs. Shipley has not yet been elevated to the Senate. She has that to look forward to.

Mrs. SHIPLEY: Thank you!

Mr. BLAIR: I have one other question. Murder is one of the most technical crimes in criminal law. Murder, in the correct legal sense, means a very definite offence and it is not correct to use it to describe every killing. It is a crime which involves certain elements which have to be proved and beyond peradventure of doubt. Many homicides and many killings are investigated and become the subject of murder charges, but none of them become murders unless and until a conviction is obtained. I would like to ask Professor Topping whether he considers the committee might beg the question by comparing charges of murder with actual murders people are supposed to have committed?

A. Well, Mr. Chairman, my problem was that I started out with a killing which is a killing investigated by the police. It could be a prosecution. I followed it right along the line. You just could not get the article written in the time necessary to do it. So I took the statistics here, checked on charges of murders, and carried through as far as I could.

By Mr. Montgomery:

Q. I have another question to ask on this point. I should like to ask the professor this: assuming that parliament decided to amend the law in relation to murder would be think the element of proof beyond reasonable doubt should be taken away in order to obtain a conviction. This is the only charge on which a man must be proved beyond a reasonable doubt to have been guilty. If you abolish capital punishment, would you say we should still retain that?—A. So far as I am personally concerned I think if a person is guilty of something the offence should have to be proved in a court, and proved beyond reasonable doubt. My theory is that in a British court, as against, for example, a Nazi court, a person must be considered innocent until he is proven guilty.

Q. There are a very large number of minor crimes where the conclusion comes to rest on the weight of the evidence, in other words, the preponderance of the evidence.—A. Here, it is mostly circumstantial evidence, and that, I think, is very dangerous, though some of our legal people will say that circumstantial evidence is the best.

Q. The next question is this: what in your opinion is the greatest deterrent against people committing the crime of murder?—A. We assume that murder and killing is related to the whole social system. I was surprised to find that in the United States, I think it was, 230 people according to the statistics I was given, were hanged for rape. We do not hang people for rape. Then I discovered that they were mostly negroes, except about six of them. That is a

type of crime fairly common in the south, and regarded as very reprehensible. There are other crimes. For example, a negro usually kills with a razor. Our young criminals in Vancouver usually carry a concealed weapon. This is the custom. I argue that you should introduce some effective control against the possession of weapons. These are the kind of controls that should stop it. If the arrangement is too severe, then you are going to have a lot of trouble in enforcing the penalty. Certainly some penalty, maybe life imprisonment, would be a very fair means to employ as a deterrent, but my argument is that whether you have capital punishment or not, the crime is related to other things. I am not saying criminals fear life imprisonment more than murder, but I do maintain that capital punishment is discriminatory and ineffective.

Q. I gather from your argument there would be more effective prevention, if there were more effective police control and if people could be sure that whoever committed a crime would certainly be tracked down.—A. I agree, but a competent counsel may make conviction difficult in a case of murder.

Q. In other words, if you can get a sufficiently good defence you can get clear?—A. That is the popular opinion.

The PRESIDING CHAIRMAN: May we take the balance of Professor Topping's presentation on Corporal Punishment and Lotteries, then, on page 11, and have it incorporated in the evidence as read?

Agreed.

CORPORAL PUNISHMENT

The school of sociology to which I belong has no objection, in principle, to corporal punishment. One should talk to people in the language they comprehend; and if force is the only language certain persons understand, then, one should use it with these persons. But such a statement of principle changes the issue. It raises the question, "Are there two kinds of people, broadly, in the world: those who yield to reason and those who yield to force?" Most people I know, many of whom favour its use on others, resent it tremendously when it is applied to them. Most delinquents are emotionally disturbed. This means that, in some cases, the application of the strap will do more harm than good.

But my surveys in 1934 and in 1925 found a surprising number of persons associated with the delinquency services in favour of the use of the strap with certain types on inmates and under certain conditions. Dr. A. E. Lavell cited the case of a man who had thanked him for having arranged to have him paddled and sent back to his wife rather than imprisoned. Supt. C. F. Neelands cited many cases of boys full of animal spirits who, having caused trouble in the shops, were strapped and returned to work. The results justified the operation, in his opinion, since, if he had placed these boys in the cells, he would have made heroes out of them; as it was, their inability to seat themselves merely drew smiles from the other inmates. He held the punishment to be just and to be recognized as just: the boys had behaved like children and they had been treated like children. The strap, in these cases, worked in the short run, apparently; and the only issue that can be raised is, "Did it, likewise, work in the long run? Was the long run effect of these strappings curative?"

These statements were made in 1925. By 1934 there was greater disagreement but a majority of those queried still favoured the use of the strap as a control. Col. Eric Pepler and I, in 1934, laid down the following

restrictions for the use of the strap at the British Columbia Boys' Industrial School, in our departmental report to the provincial secretary, the Hon. George Weir.

1. Public administration of the strap should never be permitted. (It was routine practice at the school at this period.)
2. Authorization should always be by the superintendent.
3. A regulation instrument should be used.
4. Strokes should never exceed ten without specific authorization by the attorney general.
5. The strap should never be administered by the attendant against whom an action had been taken by an inmate.
6. A second attendant should always be present to see that the number of strokes is not exceeded and to prevent the inmate making a false statement concerning what happened.

I am convinced that the sections in the code with reference to the authorization of corporal punishment by a court of law should be struck out. As I see it, corporal punishment is no more effective in deterring others than is hanging. In fact, the opposite effect has been observed in certain instances.

LOTTERIES

Since lotteries encourage an already too prevalent attitude: the desire to get something for nothing (or next to nothing), I suggest that they not be permitted in Canada. In addition, small time racketeers appear to be taking over the larger lotteries. This, in my opinion, is not in the public interest.

No reputable welfare worker with whom I am acquainted would wish to see either Canadian hospitals or Canadian welfare agencies dependent upon the uncertainties associated with games of chance.

The mails ought, likewise, to be barred to Irish sweepstakes tickets and other foreign enterprises of like nature; and the law should be enforced. The matter should be cleared, if necessary, through UN.

SUMMARY OF THE ARGUMENT

Since the statement concerning corporal punishment and concerning lotteries was brief it does not seem necessary to summarize the argument.

The PRESIDING CHAIRMAN: Now Professor Topping I want on behalf of this committee, and personally, to thank you for your attendance here today. Your presentation and your answers to the questions have been most informative and tremendously interesting, and I know I reflect the opinions of all members of this committee when I say we have enjoyed your presentation very much and we wish to thank you for it.

APPENDIX A

TABLE 1

Murder Charges and Sentences,
1880-1949, by Ten-Year Totals

Years	Numbers	Mean	Range		Numbers	Mean	Range		Per cent of
			High	Low			High	Low	
			Year	Year			Year	Year	Charges
1880-1889 ...	254	25.4	40	13	99	9.9	16	4	38.9
1890-1899 ...	223	22.3	28	16	76	7.6	13	4	34.0
1900-1909 ...	310	31.0	42	22	103	10.3	18	2	33.2
1910-1919 ...	596	59.6	86	48	233	23.3	34	17	39.0
1920-1929 ...	540	54.0	77	42	188	18.8	26	11	34.0
1930-1939 ...	450	45.0	54	35	194	19.4	25	13	43.1
1940-1949 ...	450	45.0	66	23	177	17.7	32	9	39.3
Totals	2,823	40.3	86	13	1,070	15.3	34	2	37.9
Mode		26				11			
Median ...		40				15			

TABLE 2

Executions of Capital Offenders,
1880-1949, by Ten-Year Totals

Years	Number	Per cent of Charges	Per cent of Sentences	Mean	Range	
					High Year	Low Year
1880-1889	49	19.2	49.4	4.9	12	1
1890-1899	44	19.7	57.8	4.4	10	0
1900-1909	64	20.6	62.1	6.4	13	2
1910-1919	104	17.4	44.6	10.4	19	6
1920-1929	92	17.0	48.9	9.2	13	6
1930-1939	127	28.2	65.4	12.7	22	7
1940-1949	91	20.2	51.4	9.1	14	6
Totals	571	20.3	54.2	8.2	22	0
Mode				7		
Median				7		

TABLE 3
Capital Offenders Detained for Lunacy,
1880-1949, by Ten-Year Totals

Years	Number	Per cent of Charges	Mean	Range	
				High Year	Low Year
1880-1889	11	4.3	1.1	4	0
1890-1899	10	4.4	1.0	3	0
1900-1909	13	4.2	1.3	3	0
1910-1919	41	6.9	4.1	7	2
1920-1929	53	9.8	5.3	11	3
1930-1939	64	14.2	6.4	10	3
1940-1949	60	13.3	6.0	13	2
Totals	252	8.9	3.0	13	0
Mode			1		
Median			3		

TABLE 4
Persons Sentenced to Life Imprisonment,
1880-1949, by Ten-Year Totals

Years	Numbers	Mean	Range		Ratio of Death Sentences to Life Sentences
			High Year	Low Year	
1880-1889	37	3.7	13	0	2.6
1890-1899	28	2.8	9	0	2.7
1900-1909	27	2.7	6	0	3.8
1910-1919	51	5.1	9	1	4.5
1920-1929	73	7.3	14	2	2.5
1930-1939	64	6.4	15	2	3.0
1940-1949	46	4.6	8	1	3.8
Totals	326	4.8	15	0	3.2
Mode		2			
Median		4			

TABLE 5

Commutations of Death Sentences for Murder,
1880-1949, by Ten-Year Totals

Years	Number	Mean	Range		Per cent of Sentences
			High Year	Low Year	
1880-1889	36	3.6	6	2	36.4
1890-1899	32	3.2	6	1	42.1
1900-1909	43	4.3	8	2	41.7
1910-1919	103	10.3	16	2	44.2
1920-1929	75	7.5	14	1	39.8
1930-1939	42	4.2	7	1	21.6
1940-1949	44	4.4	8	0	24.8
Totals	375	5.3	16	0	35.0
Mode		4			
Median		5			

APPENDIX B

MEMORANDUM ON CAPITAL PUNISHMENT FOR THE JOINT COMMITTEE
OF BOTH HOUSES ON THESE MATTERS BY C. W. TOPPING,
PROFESSOR OF SOCIOLOGY, UNITED COLLEGE,
WINNIPEG, MANITOBA.

Mr. Chairman and Members of the Joint Committee of the Senate and the House of Commons on Capital and Corporal Punishment and Lotteries:

My presentation will be concerned chiefly with capital punishment, since that is the matter to which I have devoted most study and most thought.

My first close contact with a capital offender took place more than thirty years ago in Kingston Gaol when I had in my charge a man and a woman, each charged with murder. The Sheriff was greatly disturbed at the prospect of having to preside at a hanging; but I, myself, was not in the least disturbed. I was a young man, just back from the wars, and I was prepared to take in stride whatever duties came my way. My Matron fainted when the woman was found guilty of the charge against her and won my contempt through this show of weakness. I considered her guilty of dereliction of duty.

Later, in my association with the Canadian Penal Association and with the John Howard Society of British Columbia, of whose Board of Directors I am an Honourary Life Member, I consistently discouraged discussion of the issue of capital punishment in the knowledge that this topic had split the Prisoner's Aid Societies of Montreal wide open and had, over the years, decreased their effectiveness as welfare agencies.

Then, in 1952, the Editorial Committee for the November issue of *The Annals of the American Academy of Political and Social Science* requested me to prepare an article on "The Death Penalty in Canada," and, in 1954, your Joint Committee of Both Houses of Parliament asked me to prepare a Memorandum for presentation before you.

I began my 1952 study with an open mind and, frankly, was not convinced by the evidence I unearthed—that murder is the safest crime to commit in Canada and that convicted murderers, by and in the large, are first offenders—that capital punishment should be abolished in Canada. But the additional study which the preparation of this Memorandum entailed has taken me off the fence. I have become convinced that few sound arguments in support of the retention of capital punishment in the Criminal Code of Canada have been presented to your Committee. Worse than that, I, myself, have been unable to locate and assemble argument for the retention of capital punishment in the Code.

I shall, therefore, present the case against the retention of capital punishment.

I. CAPITAL PUNISHMENT IS OUT OF HARMONY WITH THE
DEEPER MOVEMENTS—THE SOCIAL TRENDS—OF THE
TWENTIETH CENTURY

1. *Christianity:*

The Medieval Christian Church was opposed to capital punishment. Canon law found no place for such a penalty. Your Joint Committee received a submission from the Canadian Friends' Service Committee (Quakers) expressing a modern point of view. Radzinowicz found 17 capital crimes in England in the early part of the fifteenth century; by 1780 there were 350. The new offences added after 1500 were chiefly offences against property, most of them trivial. The English revolt against capital punishment began

around 1825, when there were still 220 capital offences; by 1861 these had been reduced to 4. Murder is the one crime in England today for which, in practice, capital punishment is put into operation. (*Annals*, November, 1952, 11). The trend in England is cited as representative of movements in Christian civilizations. Juries in England refused to convict persons who "were proved to have stolen" 40 shillings if conviction meant that such persons would be hanged. (*Loc. cit.*)

The fact that the Founder of Christianity suffered a capital penalty for heresy and for treason has made Christians hesitant to press these charges. Heresy is no longer a capital offence in Christian countries. Concerning treason, of the 99 persons sentenced to death as a result of the Canadian Rebellion of 1837-1838, only 12 were hanged.

(*Op. cit.*, 149)

The teaching of Christianity concerning the infinite value of the human person has been used as an argument for the retention of the death penalty by focussing attention on the victim of an assault. But two wrongs have seldom made one right. Either human life has infinite worth, as Christianity teaches, or it hasn't. On the basis of Christian teaching, the deliberate taking of human life by a citizen or by the State cannot be condoned.

2. *The Great and the Good:*

This has been, consistently, the position of the great and the good. Dr. Samuel Johnson was convinced that the spectators were being cheated when they were not permitted to view hangings and this position was held by the persons who constructed Kingston Gaol—with its great door to drop when the gallows was sprung. But a hanging at Kingston Gaol today would see the great door fastened firmly in place. Hangings are regarded with horror by a majority of the citizens. Those who gloat over the details as reported in the press are regarded as sadists by most of us. The cross, which to the Roman was a symbol of capital punishment, has become the symbol of Christianity; the open gallows, which was once the symbol of justice and right, has become in our day the symbol of the Roman circus as exemplified by the Emperor Nero.

3. *The Humanitarian Movement:*

We no longer hang children and we seldom hang women. Shortly we will not hang men either if the trend here is the same as in other humanitarian movements; for the trend in most of these movements has been to advocate more enlightened and humane behaviour; first, for young persons; next, for women; and, finally, for men. The British Royal Commission on Capital Punishment, 1949-1953, were impressed with the lethal injection as a substitute for hanging; but they did not recommend it in their *Report*. It is possible that they did not care to place the burden of carrying out the sentence of a court on members of a highly respected profession. Medicine, today, stands for the saving and the conservation of life; not for its destruction. And this trend towards the amelioration of the conditions under which living and under which dying take place is of the very essence of our time.

One does not wish to go off on a tangent into sociological theory, but a point made by Dr. Franklin H. Giddings may be in order under this heading. Giddings argued that one test of progress in any group was a transition from primary to secondary conflict as an instrument of policy; from the fist fight and the strong arm of the OGPU to a fair trial and the presentation of reasoned argument; from the rule by might to rule by law. Capital punishment is an instrument of primary conflict. And the pointed question he would ask the rulers of a civilized State is: "Can gangster methods stop gangsters; either in the short run or in the long run?"

4. *The New Penology:*

Capital punishment as a control cannot be fitted into the new penology. The old penology was a system of punishment based on an "eye for an eye and a tooth for a tooth" justice. Under it, the punishment had to fit the crime. The new penology by contrast is a system of treatment. It does not assume that all criminals are sick people but it does endorse principles which lie at the root of modern medical practice. If crime is sickness it is a complicated, fundamental, contagious, highly dangerous sickness, like leprosy rather than cancer. Treatment must, therefore, be highly skilled, sympathetic, patient, and frequently, of considerable duration. Doctors do not punish patients with ailments that do not yield readily to their best endeavours. They do not practice atrocities upon them; nor do they put them out of business, even quietly. The new penology is grounded in legal principles, in principles of right and of justice, as well as in medical principles. And it draws upon the social sciences, both pure and applied. Capital punishment, the deliberate killing of some one who might yield to treatment, is repugnant to those who believe in the new penology.

II CAPITAL PUNISHMENT IS INEFFECTIVE.

1. *This was the major finding in my study for the Annals*

The key sentence (*Annals*, November, 1952, 154) has already been placed in the record. The evidence should be recorded here:

"The total charges for indictable offences in 1949 were 31,134, and the total convictions 30,922, or 99.3 per cent. The convictions for Class I offences, the group with which murder is classified, were slightly less, with 5,894 convictions to 7,662 charges, or 76.9 per cent. But the highest percentage of convictions for murder to charges of murder for the whole seventy year period 1880-1949 was 43.1 (1930-39) and the lowest 33.2 (1900-1909), and for the series the percentage was 37.9. When one considers the percentage of charges that result in executions, the differential is even greater: 28.2 per cent for the high period (1930-39), 17.0 per cent for the low period (1920-29) and 20.3 per cent for the series." (*Op. cit.*, 154).

Believe me sincere when I state that this was a most surprising finding. But I see no way to reach any conclusion except that murder is the least risky of crimes in Canada.

2. *Murder is many crimes but hanging is one punishment.*

This was a major finding of the British Royal Commission on Capital Punishment, 1949-1953. May I quote from my review of the Commission Report in *Canadian Welfare*, February, 1954 (p. 40-41).

"The Commissioners discovered that murder represents not one crime, but a whole series of patterns of crime, and they present thumb nail sketches of fifty English and Scottish murderers to drive this conclusion home.—

"The Commissioners are convinced that the present law of murder does not permit sufficient weight being given to extenuating circumstances.—

"They suggest that, if no satisfactory and workable method for mitigating the rigours of the law can be devised, then the issue must become 'whether capital punishment should be retained or abolished.'"

Thus, capital punishment is ineffective, even on the old principles, since it does not fit the crime. The British Royal Commission suggests that if it cannot be made to fit, not the crime, but the crimes, that it be abolished.

3. *It permits large numbers of persons who kill to receive neither punishment nor treatment.*

Thus capital punishment fails both worlds—both schools of thought. One may argue that the killer who is acquitted of murder has received the fright of his life and has thus had something done to and for him. This is a sound argument neither in the punishment school nor in the treatment school for the action is incidental. A Vancouver study indicated that the map which resulted from spotting both killers and killed by street address was identical with maps which indicated other urban pathological phenomena: juvenile delinquency, prostitution, truancy, divorce, TB. We do something about other pathological phenomena; we cannot, in justice, take no action—no constructive action—on the killer.

4. *It does not deter.*

This is an argument that appears again and again in any discussion of capital punishment. Dr. Thorsten Sellin presented the statistical evidence on this issue to the Joint Committee. It is readily available in other sources. Is it convincing? Dr. Sellin used the comparable sample method in his presentation. He named a group of countries and states in which a series of factors were common. The difference to which he drew attention was that specific states used capital punishment as a control: other states, which he named, did not use capital punishment as a control. He showed that states with capital punishment have many murders and that states without capital punishment have many murders. He, also, showed that states with capital punishment have few murders and that states without capital punishment have few murders. Was he talking nonsense or did his presentation have some bearing on the issue?

I am convinced that this argument has great bearing on the issue and that the sound conclusion is that the presence or absence of capital punishment makes no difference. This means that it does not deter. Let us use an analogy. For years there have been on the market reputed cures for the common cold. Many of these reputed controls of the common cold have been tested under experimental conditions and it has been demonstrated that it makes no difference to the course of the cold whether the remedy is taken or not. In a word, the claims of these remedies are not substantiated. They have not found up to the present, not a cure for the common cold, but for the common colds. Colds continue to plague us and so does murder. Neither that old remedy for murder, hanging, nor these new remedies for the common cold have any merit whatsoever. We ought, then, to do our best to silence people who say that they do; in both cases.

III CAPITAL PUNISHMENT IS DISCRIMINATORY.

1. *The strong man and the strong group will exert their full strength to avoid this ultimate penalty.*

When a man is battling for his life he will exert his full force and he will draw upon all his resources and the resources of his friends. Specifically this means that he will employ the best counsel possible, even at a fee of \$20,000.00, and that he will rally what friends he has to his assistance. This counsel and these friends will use their best skill to avoid so severe a penalty as death. Legal knowledge, psychology, and experience will be drawn upon. Since the evidence is likely to be circumstantial and based on the principles of logic, conviction is difficult. Murder is a low-visibility crime with few eye witnesses who can be called in to testify at the trial. With powerful friends and resources the struggle will be a long one; no quarter will be asked or given. And there may be delays until the furore has died down; and appeals.

2. *Authorities are convinced it is discriminatory in fact and in practice.*

Warden Lewis E. Lawes writes:

"In the twelve years of my wardenship I have escorted 150 men and one woman to the death chamber and the electric chair.—In one respect they were all alike. All were poor, and most of them friendless." (*Twenty Thousand Years in Sing Sing*, p. 302)

Similar testimony has been made by Canadian authorities. There may be exceptions to the Lawes rule but this statement underlines the representative case.

3. *By committing a capital offence a nobody can become somebody.*

At the other extreme the murderer becomes notorious overnight. Through murder, a despised character becomes a ten-day wonder.

4. *The repetitive killer may escape the gallows.*

With the coming of the psychiatrist into the court, the repetitive killer—or the potentially repetitive killer—escapes the noose and goes to a mental hospital. Careful studies show that other murderers seldom repeat their crime. This situation is due to the doctrine of responsibility but, in the present case, it seems to be seriously discriminatory.

5. *The death penalty places justice beyond rectification.*

If a justice has been in error or if a decision of a judicial body has not been in harmony with the facts as presented, an action to rectify this miscarriage of justice can be taken. This cannot be done in a capital case.

6. *Circumstantial evidence may be discriminatory as against other kinds of evidence.*

It has been argued that circumstantial evidence may be the best of all evidence since it must be both consistent and logical. But it is, at least, different. Thus the murderer is convicted on different evidence to that on which other persons are convicted. This may well prove to be discriminatory.

7. *First offenders, in capital offences, are discriminated against.*

The first offender ordinarily receives favourable treatment from the court. He is frequently given probation and a chance to do better. This is not the case in capital offences.

8. *It is safer to kill some persons than others.*

A check on a series of statistical tables revealed the following: It was more risky to kill a sweetheart than a wife; it was most risky of all to kill a police officer. The most common hanging is of a man who killed while committing another offence.

10. *Capital punishment is discriminatory as to age and sex.*

Young persons cannot be hanged in Canada and women are seldom hanged in Canada.

SUMMARY OF THE ARGUMENT

A review of the evidence on hanging as a control for culpable homicide has convinced me that the arguments for its retention are unworthy of presentation before this Joint Committee of Both Houses of Parliament. I have, therefore, assembled argument for its abolition as a control.

1. *Capital punishment is out of harmony with the deeper social movements of the Twentieth Century.*

Christianity is against it. Canon law found no place for it and the teachings of Jesus, which in the Twentieth Century are being taken more and more seriously, are opposed to it. It has commonly been repudiated by the noble and the good. It cannot be reconciled with Twentieth Century humanitarian movements and it cannot be fitted into the New Penology.

2. *Capital punishment is ineffective in controlling culpable homicide.*

Statistical evidence indicates that capital punishment does not deter murderers and that, so far as Canada is concerned, murder is the least risky of all crimes. In addition, one punishment for that whole battery of crimes which is murder is considered iniquitous and simply does not get carried out. Worst of all, the killer who is charged with murder and acquitted gets off scot free. Culpable homicide, thus, invites great fuss and fury but no effective action. Such a situation is not in the public interest. The law should be changed.

3. *Capital punishment is discriminatory.*

In view of the severity of the penalty the strong exert their full force to avoid it. The weak, thus, suffer the penalty in a case of culpable homicide and the strong escape it. Warden Lewis E. Lawes has testified that this was the situation at Sing Sing and Canadian testimony has indicated that this is the situation in Canada today. Yet, on the other hand, a despicable weak character, can, by an atrocious murder, become notorious overnight and force his name onto the front page of our most reputable newspapers. In addition, the insane, potential repetitive killer can escape the gallows and receive a second chance while his first offender companion in crime is hanged. Hanging is, also, definitely discriminatory as to victim, age, and sex.

SCHEDULE A

ARGUMENTS ON CAPITAL PUNISHMENT CONSIDERED IN THE PREPARATION OF THIS MEMORANDUM:

ARGUMENTS SUPPORTING

1. *It is a permanent cure for murder so far as the killer who is hanged is concerned.*

This argument appears to be sound and unanswerable.

2. *Capital punishment deters other potential killers.*

The evidence all seems to point the other way. Murder is the least risky of Canadian crimes. Of two comparable States, it is impossible to pick, on the basis of killings, the State with capital punishment and the State without capital punishment.

3. *The killer given life imprisonment for manslaughter is likely to cost the State a minimum of \$25,000.*

This is a sound argument but it is an argument of expediency, not an argument of principle. If prisons are reorganized so that the inmates work, the killer could, then, earn his keep and this argument would lose its force.

4. *The murderer is a particularly brutal type of person.*

Cases cited in the court battle support this proposition but cases cited in psychiatrists reports do not. Imprisoned killers are reported to be "good" convicts who do well on parole and seldom get into trouble again.

5. *Gangsters will invade Canada if the fear of being hanged when they kill is removed.*

Few U.S. gangsters are hanged. They are sent to Alcatraz on income tax evasion charges. Their "finger men" may be hanged but this, too, is not common. In addition, they are present in the largest numbers in States which have capital punishment as a control: New York, Illinois, California, and the Southern States.

6. *More small time thieves and robbers will arm themselves if the fear of capital punishment is removed.*

Studies indicate that Canadian small-time thieves are not armed as commonly as are U.S. small-time thieves. This result, in my opinion, is achieved by an automatic punishment for "armed" robbery. This punishment is easy to enforce and it is effective. It is certainty of punishment rather than the severity of punishment that stops criminal acts, according to top authorities.

7. *More police officers will be shot if the fear of capital punishment is removed.*

If I were a Superintendent of Police, I would certainly press this argument for all it was worth. It would be the least I could do for the officers who on occasion must, in the kind of world we live in, face the guns of the enemy: the criminals. But has the argument great weight? Criminals who live by their wits do not go about armed—the professional thieves; some bank bandits make a practice of not carrying guns. But some bank bandits carry a whole arsenal of guns; silly youngsters also carry them and they can get trigger happy and, even, shoot at "cops". The Chicago Police Department Report of 1953 reports three officers shot in the line of duty. In each case a criminal was shot in the same exchange; in the third case two criminals were shot. In Canada, statistics indicate that the most risky killing which a criminal can undertake is the killing of a police officer. This is the surest way to get hanged in Canada. My conclusion would be that only desperate men and fools shoot policemen. Such persons are not likely to even think of a penalty, much less be deterred in their action by a penalty.

8. *Hanging should be retained as a threat even if it is permissive and not mandatory.*

The threat of strike and the threat of war are excellent bargaining devices. Does the threat of capital punishment prove equally effective when used? This is the deterrence argument in another form. If murderers killed in a bargaining mood the argument would be a most potent one; but murderers kill when intoxicated, when highly inflamed with passion, when greatly disturbed emotionally. Someone has written that Hell hath no fury like a woman scorned. The murderer is not likely to listen to reason either.

9. *Other.*

ARGUMENTS AGAINST THE RETENTION OF CAPITAL PUNISHMENT

1. *It is permanent.*

The strongest argument for capital punishment becomes the strongest argument against it in cases where a mistake has been made. No one has demonstrated that mistakes are common in Canada, but there is always the possibility.

2. *A majority of murderers are first offenders.*

First offenders are, commonly, treated more leniently than other offenders. This is not the case with a capital offence.

3. *Evidence is most commonly circumstantial.*

This evidence may be good evidence but it is a different kind of evidence to that commonly used. Murder is a low-visibility crime with all the booby traps associated with conviction in such cases.

4. *The insanity plea prevents the death penalty being applied in the case of a potentially repetitive killer.*

Criminologists distinguish between repetitive killers and others.

5. *Murder in Canada tends to be without malice aforethought; the commonest hangings are of persons who kill in committing another offence.*

As someone put it: "When is a murder not a murder? When it is a Canadian murder."

6. *The effects of carrying out the law are most unfortunate.*

(a) The hangman, apparently, has a wretched time. He commonly conceals his identity, drinks to excess, etc.

(b) The public have their sadistic tendencies roused, originally at the hanging, now through reading the press account of the murder, the trial and the hanging.

(c) Accidents happen in connection with some hangings that make them atrocities.

(d) Some weak persons appear to be incited to murder by the notoriety of a condemned murderer.

(e) Some weak persons may be incited to murder by a fear to take their own life and prefer to have the State take it.

(f) A highly despicable character may become notorious, even famous, by committing a gruesome killing and having it reported in the public press.

7. *The acquitted murderer gets no punishment at all.*

If he is genuinely innocent the courts can never rectify the wrong that has been done him. But if there has been some slip up and he is guilty, he escapes with no punishment whatsoever. A killer should not so escape. If the penalty were less final the chances of his escaping would be lessened.

8. *Capital punishment is not in harmony with the teaching of the Gospels.*

Canon Law did not have such a penalty. The Quakers and other sincere Christians are against it. The "eye for an eye" concept of justice comes from the Old Testament.

9. *Capital punishment has been repudiated by the noble and the good.*

Most great religions and most great men have been against "eye for an eye" justice.

10. *Capital punishment is out of harmony with the humanitarian movements of the Twentieth Century.*

Modern medicine seeks to save life not to destroy it and this is the case with other modern movements.

11. *Capital punishment cannot be fitted into the New Penology.*

The new penology is a system of treatment. It has no place for such a final remedy as capital punishment.

12. *It is not effective as a control.*

The major finding of my study of murder in Canada for the *Annals* was that charges of murder stick less than other charges.

13. *It does not permit enough weight to be given to extenuating circumstances.*

This was the major finding of the British Royal Commission of 1949-1953.

14. *The deterrent effect of hanging has been overrated.*

This applies both in the individual case and to the group situation.

15. *It invites the most vigorous action to avoid it, since it is final.*

Money has no value to a dead man so money becomes no object. If friends are not loyal they are no friends. The best lawyer only will do in this case. Defense counsel in this area are among the most highly specialized and the most competent in Canada.

16. *The law discriminates among killers.*

Children who kill do not hang, nor do women. Persons who kill police officers commonly do hang.

17. *The hanging of a murderer does not restore the life of his victim nor does it do anything constructive in the way of atonement.*

In a word: two wrongs never yet made right.

18. *The chief sufferers from a hanging are the loved ones of the man who has been hanged.*

Carousel made this point dramatically. It was the daughter of the would-be killer who suffered and his wife. But the kids only called her father "thief". It is bad enough to be the son of a thief; to be the son of a convict must be worse; to be the daughter of a man who has been hanged must be insufferable. Why should the Staté thrust this ignominy on any human being?

Hanging is brutal, discriminatory; out of harmony with our highest emotions and our fairest achievements. In addition, it is ineffective. This is the weight of the argument for the abolition of capital punishment as the control for murder in Canada.